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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963.

No. 632.

JAMES E. HARRIS,
Plaintiff in Error,

v.

NORFOLK SOUTHERN RAILWAY,
a corporation,
Defendant in Error

BRIEF IN OPPOSITION TO CERTIORARI

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INDEX

Page

Statement of the Case 1

Facts 1

Argument

I. Is the discretion of the trial judge in declining to comment on the medical evidence in a personal injury action a fit subject for review on certiorari by the Supreme Court of the United States? 4

II. Was the jury fairly instructed on the question of damages? 5

III. May Harris have review of a jury instruction which was given at the trial without objection as required by F.R.C.P. Rule 51? 11

Conclusion 13

TABLE OF CITATIONS

Doggett v. Atlantic Holding Corp. (C.A. 4-1956) 239 F.2d 156 11

Gasoline Products Co., Inc. v. Champlin Refining Co. 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1118 13

McCarthy v. Bruner, 323 U.S. 673; 89 L.Ed. 547, 65 S.Ct. 126 5

Palmer v. Hoffman (1943), 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 11

Rogers v. Missouri Pac. R. Co., 352 U.S. 524, 1 L.Ed. (2d) 520, 77 S.Ct. 443 5

Stonegap Colliery Company v. Hamilton, 119 Va. 271, 89 S.E. 305 10

U. S. v. Board of Education (C.A. 4-1958), 253 F.2d 760 11

Willis v. Pennsylvania Railroad Company (C.A. 4-1959), 269 F.2d 549 11

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STATEMENT OF THE CASE

Defendant in Error (hereafter sometimes called the Railroad) agrees with preliminary statement of the case by Plaintiff in Error Harris, except for his recitation of the facts.

FACTS

The Railroad will restate the facts, inasmuch as petitioner has ignored the jury's verdict in stating the facts as to the

injuries proven in this case. The jury found that Harris' injuries were limited to a slight disability of his left arm, which was the only injury sustained on the day of the accident. The jury accepted the Norfolk Southern evidence that the other injuries were not connected with the accident. There was no believable evidence to connect up Harris' other claims of injury with the accident, and the jury verdict has settled all conflicts in the evidence. The facts will be stated in the light of the verdict of the jury, the jury verdict having been approved by the trial court and the Court of Appeals.

James E. Harris, a section hand employed by Norfolk Southern Railway Company, was assisting in the operation of driving spikes into railroad ties on April 23, 1957 (Tr. 71). He was holding a crow bar wedged under the tie to "nip" the tie closely up under the rail to be spiked. Two other laborers were driving spikes into the tie with heavy, pointed hammers or mauls. As the work proceeded, one of the mauls struck the top edge of the rail rather than the head of the spike and caused a small sliver or splinter, the size of half a dime or less. The small splinter, though driven downward by the maul, freakishly flew sideways in the air and struck Harris' left forearm on the outer or extensor surface (Tr. 266, 276). The tiny fragment barely penetrated beneath the skin of the forearm and came to rest before reaching the bone (Tr. 266, 281; Defendant's Exhibit 3). The location of the splinter was more than two inches toward the elbow from the wrist joint (Tr. 268).

After being injured, Harris was able to drive his own automobile to the doctor's office and back twice on the day of the accident (Tr. 59). He was given prompt medical care by Dr. Robert McAlpine, a competent surgeon. X-rays

were taken the same day, which positively located the splinter before it was removed and also showed a previous fracture of the ulna bone at the wrist joint (Defendant's Exhibit 3). Dr. McAlpine removed the splinter from Harris' forearm in a routine operation and his recovery was uneventful (Tr. 283). Harris returned to his old job with the railroad within a few weeks and continued doing manual work for the railroad for two years after that (Tr. 71, 395, 396). In March, 1959, he instituted this action for damages and in July, 1959, he voluntarily left the employment of Norfolk Southern and has refused to work since then (Tr. 71).

The positive opinion of the surgeon who treated Harris was that he suffered a five per cent disability as a result of the accident and no other disability (Tr. 327, 328, 291, 294, 295, 296, 297). This opinion was shared by Dr. George A. Duncan, an eminent orthopedist (Tr. 341), and another eminent orthopedist, Dr. Gervas S. Taylor, Jr. gave him no disability at all (Tr. 363).

As of the date of the accident, it was conclusively established that plaintiff had suffered a previous fracture in his left wrist area and was suffering from congenital defects in several of the wrist bones (Tr. 192, 209, 211, 215, 264, 266, 340, 341, 346, 347). These pre-existing disabilities of the wrist, which were in no way aggravated by the accident, caused four later surgical operations, three by Dr. Kirk and one by Dr. Sawyer, all of which were unrelated to the accident (Tr. 171, 172, 173, 175, 180, 186). The emotional difficulties, which arose two years later and became disability only after litigation was begun, related mainly to difficulties with (1) the wrist, rather than the forearm, (2) wrist surgery and (3) imaginary mistreat-

ment by some of the doctors, not identified by the plaintiff (Tr. 239, 240, 241, 245, 246). None of these disorders had any connection whatsoever with the accident.

ARGUMENT

I

Is the discretion of the trial judge in declining to comment on the medical evidence in a personal injury action a fit subject for review on certiorari by the Supreme Court of the United States?

The petition for certiorari, stripped of useless detail, presents only the question of whether the trial court erred in failing to summarize the medical evidence for the jury. Rule 19 of Supreme Court rules says: "A review on certiorari . . . will be granted only where there are special and important reasons therefor."

In this case, the trial judge stated to the jury (Tr. 465):

> "One thing that is given to the United States District Court is the right to comment on the evidence. I make it a policy not to indicate to the jury how I feel about the factual situations of any kind, because if we truly believe in the jury system, then we should leave the factual matters for the jury to decide."

The judge left all factual matters to the jury without objection by Harris. On conflicting evidence, the jury found for Harris in some respects, but found that he had failed to prove the Railroad liable for all the damages he claimed.

There is no "special and important" reason why the

Supreme Court of the United States should review this case after it has been reviewed by the District Court (on motion for new trial), the Court of Appeals (on briefs, oral argument and supplemental briefs) and has been considered a second time by the Court of Appeals (on petition for rehearing *en banc*). This is one of tens of thousands of damage cases tried yearly in which the litigants would surely seek review of the various incidents of trial, if the Supreme Court were able to hear them and still do justice to its duty to decide the large and important matters of national concern.

Supreme Court Rule 19 sets forth five categories of reasons influencing the Court's discretion in favor of review on certiorari. This case is in none of the five: It is an FELA case, but it does not involve the construction or scope of the statute. This is not a fit case for certiorari. *McCarthy* v. *Bruner*, 323 U.S. 673, 89 L.Ed. 547, 65 S.Ct. 126; dissent of Mr. Justice Frankfurter in *Rogers* v. *Missouri Pac. R. Co.* 352 U.S. 524, 1 L.Ed. (2d) 520, 77 S.Ct. 443.

II

Was the jury fairly instructed on the question of damages?

Railroad says that, regardless of petitioner's failure to object to the jury charge, the jury was fully instructed on the question of damages. The court's charge (Instruction 14) on this part of the case was as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in

assessing damages against the plaintiff, you should determine the amount of damages suffered by the plaintiff directly and proximately in consequence of his injury, and you should find the amount of damages to be such a sum of money as will fairly, justly and adequately compensate him for his injury. In determining the amount of such damages, you may take into consideration his age, earning capacity, and the character, extent and severity of his injury, the pain, inconvenience and embarrassment, if any, that he has endured up to the present time, and the pain, inconvenience and embarrassment, and suffering, if any, that it is reasonably certain he will endure in the future; you may also take into consideration such disability, if any, as he has suffered up to the present time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into consideration the plaintiff's mental anguish, if any, his loss of wages, if any, and you will consider the above elements, if any, so far as they have been proved by a preponderance of the evidence to have resulted from the accident in question; you will thereby determine from the evidence what sum will be fair and just compensation for the plaintiff's injury."

The jury fully and fairly considered the question of plaintiff's damages. The Railroad says that the record shows that it made twenty-four separate attempts to limit the medical evidence to illness or disease connected by proof with the accident (Tr. 42, 27, 72, 77-84, 132, 170, 171, 176, 206, 228, 230, 256, 257, 258, 424, 444-446, 447, 449 and 463). These attempts included objections to the admissibility of testimony, objections to the admissibility

of exhibits, motions to strike evidence already admitted, motions for mistrial because of evidence already admitted, objection to a jury instruction (PX) which emphasized such evidence, and the offer of instructions (A, E, F and G) which would eliminate jury consideration of such evidence. The trial court exercised its discretion to leave this evidence before the jury and consistently ruled against the Railroad. Considering that more than two-thirds of the evidence was medical and the jury observed more than a dozen unsuccessful attempts by the Railroad to exclude or limit this evidence, the Railroad says that medical issues were fully submitted to the jury. It was a matter for the sound discretion of the trial judge to determine whether or not to comment on the medical evidence. In choosing not to comment, he decided not to emphasize any portion of the medical evidence in favor of the plaintiff and not to limit the jury's consideration of the medical evidence as asked for by the Railroad.

Under these circumstances instruction No. 14 (quoted above), telling the jury to "fairly, justly and adequately compensate" plaintiff for his injury, completely submitted all issues of damage to the jury. The argument of counsel to the jury was long and detailed on all the medical aspects of the evidence. The court certainly considered that the matter had been fully submitted, as shown by his remarks after the verdict. Plaintiff's counsel also considered that the case had been fully submitted, inasmuch as his motion for a new trial made no mention of insufficient instruction, but was based on the sole grounds that "damages are . . . inadequate". The Railroad says that plaintiff had a fair trial on the question of damages.

In detailing the evidence, Harris on petition for certi-

orari recites at length the testimony of various doctors as to his illness in the period of time after April 23, 1957. There is no evidence, much less preponderant evidence, that this illness was proximately caused by the tiny steel splinter. The particular doctors appellant relies on are Quarles, Sawyer, Kirk, Thrasher, Woodson and Cantor. Appellant fails to recite all the testimony of these six witnesses.

Dr. Joseph Quarles: Dr. Quarles testified that Harris concealed the important part of his medical history that the April 23, 1957, X-ray showed an old healed fracture of the wrist end of the ulna bone (Tr. 149, 150). Dr. Quarles' opinion was based on incomplete facts, and his medical treatment of Harris related to illness for which Norfolk Southern Railway Company was not responsible.

Dr. W. W. Sawyer, Jr.: Dr. Sawyer testified that Harris' nerve disorders and arm pain came from the old fracture, which the railroad did not cause (Tr. 171, 172, 173, 185); that the nerves in the forearm are remote from the site of the splinter wound; and that no nerve damage (neuroma) resulted from the accident of April 23, 1957 (Tr. 180-184).

Dr. Arthur A. Kirk: Dr. Kirk said the following:

a. ". . . exploration of the tendons of his wrist did not show any abnormality or any evidence of having been severed" (Tr. 192);

b. ". . . the piece of metal in my opinion did not cause any fracture of the forearm . . ." (Tr. 192);

c. That Harris had congenital defects in the bones of

his wrist, which made surgery necessary (Tr. 192, 209, 211);

d. That the April 23, 1957, X-rays seen by Dr. Kirk showed "an old fracture, which was apparently present before the injury" and the fracture was "at least six months old and probably several years old" (Tr. 192, 209, 215);

e. That Harris was exaggerating his complaints (Tr. 196, 214) with litigation in mind (Tr. 214); and

f. That the claims of injury other than the forearm wound were falsely recited by Harris (Tr. 211).

This was the plaintiff's own witness, Dr. Kirk, saying that all of the illness treated by him was foreign to the accident.

Dr. Robert H. Thrasher: Dr. Thrasher's opinion was specifically qualified by his statements:

a. That a settlement of the litigation might have a bearing on Harris' disability (Tr. 238);

b. That concern over his fractured and congenitally deformed wrist played a real part in the disability (Tr. 239, 240);

c. That the *primary* cause of the mental disorder was "improper medical care" (Tr. 240, 241); and

d. That the accident "precipitated" (or hastened) the nervous disorder rather than being its proximate cause (Appellant's Appdx. 29).

Dr. Thrasher's testimony did not provide the necessary causal link between the accident and the mental disability.

Dr. F. G. Woodson: Dr. Woodson failed to connect the plaintiff's disability with the accident at all. The transcript is bare of any opinion by him that Harris' mental trouble was caused by any event of April 23, 1957. Dr. Woodson's testimony, much like Thrasher's, was that Harris' improvement was linked to (1) the court action (Tr. 243); that he was partly concerned with his (2) wrist (Tr. 245); that the cause of his emotional trouble was (3) impossible to pinpoint (Tr. 246); and that the *primary* cause was upset over (4) imaginary poor medical treatment (Tr. 245, 246).

Dr. Paul Cantor: Cantor's medical opinion was based on the plaintiff's false claim that he had fractured his wrist on April 23, 1957 (Tr. 123). He testified that he relied on that history in establishing his diagnosis (Tr. 113). His opinion as to the proximate cause of the disability was expressly based on the false assumption that a fresh fracture of the left ulna occurred and was treated on April 23, 1957 (Tr. 129-133). The failure of plaintiff to introduce evidence to support the hypothesis for this opinion made this testimony inadmissible. *Stonegap Colliery Company* v. *Hamilton*, 119 Va. 271, 89 SE 305.

After reviewing the testimony of plaintiff's six chief medical witnesses, Norfolk Southern says that the link between the accident and the injuries is missing, when considering only plaintiff's witnesses. The testimony of Doctors McAlpine, Duncan, Thomas, Wood and Taylor, called by the Railroad, conclusively proves lack of causation.

III

May Harris have review of a jury instruction which was given at the trial without objection as required by F.R.C.P. Rule 51?

Plaintiff failed to object distinctly to the jury instructions as required by Fed. R.C.P. Rule 51.

Rule 51 says plainly:

> "No party may assign as error the giving or failure to give an instruction unless he *objects* thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis added.)

The purpose of this Rule is clearly set forth in *Palmer* v. *Hoffman* (1943), 318 U.S. 109, 63 Sup. Ct. 477, 87 L.Ed. 645, wherein the court says at page 119:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general objection obtain a new trial."

Accord: *Willis* v. *Pennsylvania Railroad Company* (C.A. 4-1959), 269 F. 2d 549; *U.S.* v. *Board of Education* (C.A. 4-1958), 253 F. 2d. 760; *Doggett* v. *Atlantic Holding Corp.* (C.A. 4-1956) 239 F. 2d. 156.

Plaintiff below did not fairly call to the attention of the

trial judge the errors he now claims in the jury instruction given on damages. The record plainly shows that he failed to object to the refusal of instruction P8. He also failed to object to the giving of instruction No. 14. He now says that the jury was not allowed to consider medical expense, but he did not call this to the trial judge's attention. If he had, the Railroad would not have objected to the change in the instruction, as shown by the repeated references to 'medical expense' in instructions F and G tendered by the Railroad.

Plaintiff says that the court erred in failing to give instruction PX, but PX is not a proper instruction on several grounds:

1. There is no evidence of causal connection between the piece of steel and plaintiff's mental disorder;

2. PX is a finding instruction directing the jury to find in plaintiff's favor without reference to the evidence or a preponderance of the evidence;

3. It directs a finding in plaintiff's favor using the work 'precipitated' rather than the legal requirement of proximate cause; and

4. It singles out parts of the damages for emphasis.

The tender of instruction PX, a defective instruction, is not a sufficient calling of the trial judge's attention to the error now claimed by plaintiff (that instruction No. 14 did not submit the question of plaintiff's mental disorder to the jury). The plaintiff failed to object to instruction No. 14 and did not distinctly state to the trial judge that the question of mental disorder was withdrawn from the

jury by instruction No. 14 (for, indeed, it was not withdrawn).

CONCLUSION

The Railroad says that this is not a proper case for certiorari, having been decided rightly by both the Courts below. In no event should a new trial limited to damages only because the issue of damages is too closely connected with the details of the accident to be separated. *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1118.

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